

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/13 of 2021

BETWEEN:

SUNDRY WORKERS

Employee

and

ANTIGUA AND BARBUDA PORT AUTHORITY

Employer

Before:

The Hon. Samantha May- Francis

President (Acting)

The Hon. Judith A. Dublin

Member

The Hon. John H.R. Benjamin

Member

Appearances:

Mr. Ralph Potter of The People's Union Representatives for the Employees

Mr. Craig Jacas and Ms. Talia N. DaCosta of Stapleton Chambers, Attorneys-at-Law
for the Employer

2024: December 3

2025: January 14

March 28

DECISION

2 (Acting), May-Francis

INTRODUCTION

1. On April 13, 2021, the Employees Xavier Mason, Cornell Humphreys, Collin Barnes, Cameron Thomas, Lyndon Greene, David Weste, Jason Massiah and James Lee, represented as Sundry Workers, filed a Reference effectively commencing this claim. Based on their Memorandum, which was also filed on April 13, 2021, and the Employers' Memorandum of Defence filed on May 20, 2021, the dispute concerns a difference in the position of the Parties as to the terms which were negotiated and agreed between them and subsequently deduced in Collective Bargaining Agreement (the Agreement) dated July 24, 2008, particularly in relation to the issue of overtime pay.



2. The Agreement between the Parties from November 1, 2006 to October 31, 2008, provides an allowance in lieu of overtime under Article 29 (3). However, the Employees contend that there was never an agreement between the Parties for the Employer to pay the Employees in lieu of overtime.
3. As the matter progressed through the Court, on March 15, 2023, the Employer filed an Application requesting that the Employer's Memorandum of Defence be struck out under Section 36 (1)(b) of the Industrial Court (Procedure) Rules (the Rules). Alternatively, that summary judgment be entered under Section 35 (1) of the Rules. The Employer's Application was supported by the Affidavit of Mrs. Jacqueline Swift, the Human Resource Manager of the Employer, with accompanying exhibits JS1 - JS4.
4. On March 29, 2023, the Employer filed written Submissions and a List of Authorities supporting its application.
5. The Court scheduled the matter for hearing on March 13, 2023, March 27, 2023, and March 30, 2023. The Employees filed written arguments on April 19, 2024. Thereafter, there was a reconstitution of the Court, and the matter recommenced on December 3, 2024, but adjourned because the Employer's sole witness was ill. The Court relisted the matter for hearing on January 14, 2025. The Court heard the oral evidence of the Employees' witness, Mr. Peter Leonard and Mrs. Jacqueline Swift, for the Employer. Both parties filed written submissions with oral arguments. On February 3, 2025, the Employees filed written closing arguments.

BACKGROUND

6. By Reference No. 8 of 2008, filed on July 15, 2008, Employees of the Antigua and Barbuda Port Authority, the Employer, herein commenced a claim before this Court against the Employer. The Employees to the Reference were Xavier Mason, Cornell Humphreys, Colin Barnes, Cameron Thomas and Lyndon Greene. The Employees in Reference No. 8 of 2008 claimed that they were due overtime pay from September 2002 to the present, interest at the rate of 10% per annum upon any overtime payment for the same period and that Mr. Greene should be paid the same risk allowance as a senior a Pilot.
7. On June 16, 2011, Former President of this Court, the Learned Philip A. Pilgrim, relying on the case of **Caribbean Relay Company and Sundry Workers of the Antigua Port Authority**, determined none of the Employees were entitled to be paid overtime payments for the period September 2002 to October 31, 2006. Relying on correspondence dated April 26, 2006, concluded in paragraph 54 of the Judgment that "*....all reference to the payment of Risk Allowance required the virtual elimination of a payment of overtime work*".

3. The employees appealed to the Court of Appeal in **Xavier Mason et al. v Antigua Port Authority Suit No ANUCVAO2014/0027**. They advanced four (4) grounds on appeal. On May 31, 2017, by its oral decision, the Court of Appeal held that, having heard the submissions of the Employees that they had a statutory right under Section C 27 of the Antigua and Barbuda Labour Code and the Employers' argument that there was no evidence of overtime worked, the issue of whether the Employees waived their right under Section C27 could not arise. The Court also determined that a breach of Section C27 would not give rise to a claim of overtime not worked. The result was that the Court of Appeal dismissed the Employee's claim.

THE APPLICATION

The Employee's Argument

9. The Employees accept that the Agreement was executed on July 24, 2008. The Employee's case, as we understand it, is that they are due overtime pay for work performed outside their regular working hours of 7:00 a.m. to 3:00 p.m. from 2009 to present.
10. According to the Employees, overtime pay was never discussed during the Collective Agreement negotiations. They contend that the only special allowances discussed and agreed to were risk allowance and call-out allowance.
11. The Employees Jason Massiah and David Weste claim to have due and owed to them unpaid travel and telephone allowance from 2009 to the present.
12. In their closing written arguments, Learned Representative Mr. Potter argued that the claim brought by the Employees, except David Weste and Jason Massiah, was related to overtime payments from 2002 to 2008. Mr. Potter argued that since 2009, the Employees have regularly worked overtime. He posited that Mrs. Swift's evidence supports that the Employees worked overtime. Under cross-examination, Mrs. Swift accepted that the Employees' regular working hours from 2009 to the present are 7:00 a.m. to 3:00 p.m. and that work performed after 3:00 p.m. is overtime work. She also conceded that not because there is no record of overtime worked meant that the Employees did not work overtime.
13. Mr. Potter argued that the cases are not the same. He stated that Reference No. 8 of 2008 concerned overtime worked from 2002 to 2008, whereas the Reference before the Court is for 2009 to present. Additionally, the Employees are entitled to overtime under Section C27.
14. He contended that having signed the Collective Bargaining Agreement after filing Reference 8 of 2008; the Employees were not able to raise the issue of 'Allowance in Lieu of Overtime' in the context that this was not negotiated and agreed upon. He

echoes this same argument regarding the variation of work hours as stated in the Collective Bargaining Agreement of July 24, 2008.

The Employer's Response

15. In its Memorandum of Defence, the Employer denied that there was an ad hoc schedule in the Marine Department. They denied treating the Marine Crew, of which the Employees herein are a part, any differently from the other employees regarding overtime. The Employer's position is that the Marine Crew received substantial increases in their salaries in 2002, which elevated them to middle management and eliminated their entitlement to overtime pay. The Employer states that there is no outstanding travel and telephone allowance due to the Employees. They contend that the only allowances they are required to pay based on the last negotiated Collective Agreement- Article 29, is an allowance in lieu of overtime and an on-call allowance in lieu of overtime. The Employees have not provided any evidence of overtime worked.
16. In the written arguments, Learned Counsel Mr. Craig Jacas contended that the Court of Appeal had already determined that the Employees were not entitled to receive overtime pay where there is no evidence that the Employees worked overtime.
17. In their written arguments, Learned Mr. Jacas argued that the Employees' claim does not disclose any reasonable grounds for bringing a claim and/or they are an abuse of the process of the Court. He argued that the claim is res judicata and that the Employees are attempting to relitigate the matter even after the Court of Appeal determined it with no further challenge before a court of superior jurisdiction. They contend that the Collective Bargaining Agreement terms, which the Parties duly signed on July 24, 2008, are still in force.
18. Learned Counsel further contends the Employees raised no contention with the provision in "lieu of overtime" during the 2008 matter. He further submitted that just as in the Reference of No. 8 Of 2008, the Employees cannot produce any evidence of overtime because none exists.
19. Regarding the Employee's Claim for overtime pay outside their regular hours. He contends that the Court of Appeal rejected that argument because the provision in lieu of overtime took away the Employee's right to overtime pay for work performed outside the regular working hours of 6:00 a.m. to 10:00 p.m.

RESOLVING THE ISSUES:

Should the Employee's Reference be struck out for abuse of process/res judicata?

20. The Employer made its Application to strike out the Employees' Memorandum under Rule 36, which authorizes the Court to strike out a statement of claim or part thereof if it appears to the Court that the statement of claim or part thereof does not disclose any reasonable ground for bringing the claim or is an abuse of the process of the Court or there has been a failure to comply with any of the Rules or any Direction or Order of the Court.

21. We reminded ourselves of Lord Diplock's sentiments in **Hunter v Chief Constable of the West Midlands Police & Ors** [1981] 3 All ER 727, where he described the power of the Court to strike out a claim for being res judicata. He stated:

".....which any court of justice must possess to prevent misuse of its procedure in a way in which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would, otherwise bring the administration of justice into disrepute among right-thinking people".

22. The principle of res judicata, as submitted by Learned Counsel Mr. Jacas, was explained in the case of **Henderson v Henderson** [1843] 67 All ER 313.... Wigham V.C. as follows:

".....where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

23. The principles that are engaged in an application to strike out a claim made based on abuse of process are summarised by Lord Bingham in **Johnson v Gore Wood & Co** [2000] UKHL in the following pronouncement:

"There is an underlying public interest ... that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the Court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to

be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the Court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the Court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. ... [I]t is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

24. From the authorities, the underlying principle in *res judicata* is that where a party has brought an action against another, a later action against the party against whom the action has been brought may be struck out where the second action is an abuse of process. The burden of establishing abuse of process is on the party against whom the action was commenced. In the context of this Reference, the burden of establishing abuse of process rests on the Employer.
25. Therefore, the starting point for consideration of the Application before us is whether the Employee is seeking to relitigate the same issue already determined in Reference No.8 of 2008 and ANUHCVP2014/0027.
26. We agree with the Employees that this Reference relates to overtime pay from 2009. As argued by Learned Representative Mr. Potter, it is also noteworthy that the Parties to the matter are not the same. This Reference includes additional issues for the Court to determine, particularly unpaid travel allowances to David Weste and Jason Massiah and their outstanding public holiday pay from 2009. Additionally, we note that Mr. Weste and Mr. Massiah were not parties to Reference No. 8 of 2008.
27. We wish to add that it is well-settled law that the jurisdiction to exercise the 'nuclear weapon' of striking out should be exercised sparingly as the exercise of this jurisdiction deprives a party of its right to a trial and or of its ability to strengthen its case through the process of disclosure. Striking out is limited to clear instances where

there was no point in having a trial. In our opinion, this is not the case here. Therefore, we have decided not to strike out the action.

Summary Judgment

28. The Employers have requested in the alternative Summary Judgment in terms to be determined by the Court under Section 35 (1) of Industrial Court (Procedure) Rules. This rule permits the Court to enter summary judgment on a Reference or a particular issue if it considers that a party has no real prospect of success with its claim or successfully defending it.

29. Lord Woolf in **Swain v Hillman [2001] 1 All E.R.** outlined the test and threshold. He explained the test quite succinctly when he said:

"The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success...they direct the Court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."

30. In the case of **Saint Lucia Motor and General Insurance Co. Ltd. v Peterson Modeste SLUHC VAP2005/0008**, George-Creque JA, as she then was, explained:

"...Summary judgment should only be granted in cases where it is clear that a claim on its face obviously cannot be sustained, or in some other way is an abuse of the process of the Court. What must be shown in the words of Lord Woolf in Swain v Hillman is that the claim or the defence has no "real" (i.e. realistic as opposed to a fanciful) prospect of success. It is not required that a substantial prospect of success be shown. Nor does it mean that the claim or defence is bound to fail at trial. From this it is to be seen that the Court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such evidence as there is before it and on that basis to determine whether the claim or the defence has a real prospect of success. If at the end of the exercise the Court arrives at the view that it would be difficult to see how the Claimant or the Defendant could establish its case then it is open to the Court to enter summary judgment."

31. Under cross-examination on her Affidavit, Mrs. Swift accepted that the Employee's regular work hours were from 7:00 a.m. to 3:00 p.m. She acknowledged that the Employees worked outside these hours. She testified that the Employees did not receive pay for the hours worked outside the regular hours. There was also an admission by Mrs. Swift that the Employees concerned worked public holidays and did not receive public holiday pay.

32. We note that the Collective Bargaining Agreement provides for the payment of an allowance in lieu of overtime, but it does not mention a risk allowance. We also know

that the April 26, 2006 Side Letter predates the Collective Bargaining Agreement. We also considered the evidence of Mrs. Swift. The Court must be alive to the possibility that one party may have agreed to something which, with hindsight, did not serve that party's interest. At the same time, we must apply the natural language of the terms of the Collective Agreement.

33. We reminded ourselves that the right to overtime pay is one of the minimum standards entrenched in the Labour Code. Section A8 emphasizes that the Labour Code sets minimum standards, and employers are free to offer better terms and conditions of employment. This statutory duty to pay overtime, according to Section A8, cannot be negotiated through collective bargaining if what is agreed upon falls below the standards set by the Labour Code. Additionally, we noticed that the Collective Bargaining Agreement followed the side letter, but it does not refer to the side letter or the "Risk Allowance" as being paid to the Employees instead of overtime. Nor has the Employer provided any evidence to suggest that there has been a revision of the standards by the Minister as provided under Section C27.
34. We have carefully considered the summary of the oral decision of the Court of Appeal in **Xavier Mason, Cornell Humphreys, Collin Barnes, Cameron Thomas and Lyndon Greene v Antigua Port Authority ANUHC VAP2014/0027**. The Employer accepted that the Employee had a right to overtime pay. Based on the Judgment, had evidence of overtime worked been submitted to the Court, the Employees would have been entitled to overtime pay based on the concession by the Employer of the effect C27.
35. We also note that the Court of Appeal's Summary made no finding that the "Risk Allowance stipulated in the April 26, 2006, side letter is the allowance in lieu of overtime contained under Article 29(3).
36. The Court requested and afforded the parties great latitude in providing evidence to assist the Court. We are therefore mindful that the disclosure process is ongoing and that we have not heard the evidence from the Employees. We are not persuaded that no records exist to determine the hours worked by the Employees or that they worked overtime to facilitate the departure of vessels, notwithstanding how voluminous they may be. The Employers are the record keepers, and that responsibility must account for something in the disclosure of the evidence and fair determination of this matter. Additionally, the Court considered its powers under Rule 31 of the Rules and Section 10 of the Industrial Court Act.
37. Additionally, we are guided by the case of **Lester Jonas v Jumby Civil Appeal ANUHLTAP2019/0002**- in allowing the appeal by the employee for overtime and holiday pay, Learned Justice of Appeal Trevor Ward stated:

"The appellant, being an employee within the meaning of the Antigua and Barbuda Labour Code, was entitled to premium pay at the prescribed statutory rate for hours worked in excess of the 40-hour work week. There was no evidence before the Industrial Court that the appellant was remunerated at a higher salary level to compensate him for having to work overtime and on holidays. In addition, the Industrial Court's conclusion that 'if payment for overtime and off days was intended for the employees and other managers this benefit would have been negotiated and included in the contract or memorandum of agreement' fails completely to address the provisions of the Labour Code prescribing mandatory minimum standards in relation to premium pay for employees. The effect of these provisions is that where the contract of employment expressly derogates from these minimum standards or is silent in relation to premium pay, those terms are null and void to that extent, and the provisions of the Labour Code apply. However, in the absence of some evidential basis that provides at least some rough estimate of the number of overtime hours worked by the appellant, only a nominal sum should be awarded under this head, set at \$5000.00".

38. Therefore, we conclude that there are fundamental issues that need further consideration. Hence, summary judgment of this matter is inappropriate without full disclosure by the Employer and fuller investigation of the evidence through the testimony of the Employees. The Application for Summary Judgment is refused.

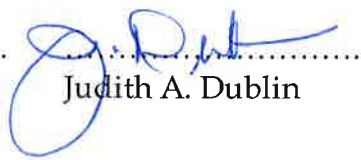
ORDER

39. It is hereby ordered:

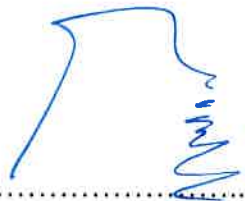
- (1) The Employer's Application filed on March 15, 2023, for striking out of the Reference and in the alternative for summary judgment is refused.
- (2) No order as to costs.



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Samantha May-Francis



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Judith A. Dublin



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John H.R. Benjamin



